

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**KEVIN V. BYNG,**

**Plaintiff,**

**No. 9:07-cv-471  
(GLS/DRH)**

**v.**

**JAMES L. CAMPBELL,** Sheriff of Albany  
County, *et al.*,

**Defendants.**

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**APPEARANCES:**

**OF COUNSEL:**

**FOR THE PLAINTIFF:**

Kevin V. Byng  
*Pro Se*  
1213 Court Street  
Utica, NY 13502

**FOR THE DEFENDANTS:**

ROBERT P. ROCHE, ESQ.  
Attorney for Defendants Campbell,  
Albany County Sheriff's Department,  
D. Delong, and M. Rose  
36 South Pearl Street  
Albany, NY 12207

Thuillez, Ford Law Firm  
Attorney for Defendants Correctional  
Medical Services, Dr. Robnowitz,  
Dr. Salzman, Rich, Debbie,  
Gloria Cooper, and Jill Harrington

KAREN A. BUTLER, ESQ.  
KELLY M. MONROE, ESQ.  
WILLIAM C. FIRTH, ESQ.

20 Corporate Woods Boulevard  
6th Floor  
Albany, NY 12211-1715

**Gary L. Sharpe**  
**U.S. District Judge**

**MEMORANDUM-DECISION AND ORDER**

**I. Introduction**

The above-captioned matter comes to this court following an order by Magistrate Judge David R. Homer, filed March 20, 2009, denying plaintiff Kevin Byng's motion for appointment of counsel, and a Report and Recommendation Order (R&R) by Judge Homer, filed March 4, 2009. (Dkt. Nos. 145, 152.) The R&R<sup>1</sup> recommended that Byng's motion to dismiss this action without prejudice (Dkt. No. 132) be denied. Pending are Byng's appeal from an order denying appointment of counsel (Dkt. No. 154) and objections to the R&R (Dkt. Nos. 149, 150) . For the reasons that follow, the court (1) affirms Judge Homer's order denying Byng's renewed motion for appointment of counsel and (2) adopts Judge Homer's R&R as to Byng's motion to dismiss this action without prejudice under Rule 41(a)(1)

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<sup>1</sup>The Clerk is directed to append the R&R to this decision, and familiarity therewith is presumed.

of the Federal Rules of Civil Procedure (FRCP). The court further orders that Byng's motion for voluntary dismissal without prejudice under FRCP 41(a)(2) is denied.

## **II. Background**

Kevin Byng, a former New York State prison inmate, commenced this action on May 2, 2007, pursuant to 42 U.S.C. § 1983. (See Compl., Dkt. No. 1.) On February 9, 2009, Byng moved to dismiss without prejudice under FRCP 41(a). (Dkt. No. 132.) And on March 12, 2009, Byng sought appointment of counsel under 28 U.S.C. § 1915(e). (Dkt. No. 151.) Defendants opposed Byng's motion to dismiss and refused to stipulate to dismissal unless it is with prejudice. (Dkt. Nos. 133, 135, 139.)

On March 4, 2009, Judge Homer recommended that Byng's motion to dismiss this action without prejudice be denied. (Dkt. No. 145.) On March 20, 2009, Judge Homer denied Byng's motion for appointment of counsel without prejudice, to renew at the time of trial. (Dkt. No. 152.) The court now turns to Byng's objections to the March 4, 2009 R&R and appeal from the March 20, 2009 order. (Dkt. Nos. 149, 150, 154.)

## **III. Discussion**

### **A. Order Denying Appointment of Counsel**

In deciding non-dispositive pretrial issues, magistrate judges in this district are afforded the broadest discretion, and will be reversed only when that discretion is abused. *See Miller v. Loughren*, 258 F. Supp. 2d 61, 61 (N.D.N.Y. 2003) (citation omitted). This court will modify or set aside any portion of the magistrate judge's non-dispositive order only if it is found to be "clearly erroneous or contrary to law." FED. R. CIV. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). Finding Judge Homer's order denying plaintiff's renewed motion for appointment of counsel not an abuse of discretion, clearly erroneous, or contrary to law, it is affirmed.

**B. Report and Recommendation Order**

Before entering final judgment, this court routinely reviews all report and recommendation orders in cases it has referred to a magistrate judge. If a party has objected to specific elements of the magistrate judge's findings and recommendations, this court reviews those findings and recommendations de novo. *See Almonte v. N.Y. State Div. of Parole*, No. 04-cv-484, 2006 WL 149049, at \*6-7 (N.D.N.Y. Jan. 18, 2006). In those cases where no party has filed an objection, or only a vague or general objection has been filed, this court reviews the findings and

recommendations of a magistrate judge for clear error. *See id.*

Byng filed both an objection and a supplemental objection to Judge Homer's R&R. (Dkt. Nos. 149, 150.) Byng's objections are non-specific and unrelated to the R&R, and fail to address Judge Homer's recommendations regarding FRCP 41(a)(1). Thus, upon review for clear error, the R&R correctly concluded that Byng's motion to dismiss this action without prejudice under FRCP 41(a)(1)(A)(ii) be denied.

**C. FRCP 41(a)(2)**

Byng argues that dismissal without prejudice should be granted under FRCP 41(a)(2). Absent a stipulation of dismissal by all parties, FRCP 41(a)(2) provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." In ruling on a motion to dismiss without prejudice, the factors a court may consider include: "the plaintiff's diligence in bringing the motion; any undue vexatiousness on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss." *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990) (citations and internal quotation marks omitted).

Byng's explanation for the need to dismiss is inadequate. It is based solely on his "incarcerated pro se status," "medical [and] mental health illnesses and medication," and entry into a "parole/restricted treatment program" with limited access to legal materials and assistance. (See Dkt. No. 132.) Moreover, this action has been pending for over two years and "defendants have expended a tremendous amount of time and resources in defending this action to date including . . . the retention of several experts." (See Def. Mem. of Law at 2, Dkt. No. 135.) Therefore, for the reasons outlined by defendants, (see *id.* at 2-3), and for Byng's failure to provide an adequate explanation for dismissal without prejudice, (see Dkt. Nos. 132, 138, 149, 150), Byng's motion for dismissal under FRCP 41(a)(2) is denied.

#### **IV. Conclusion**

**WHEREFORE**, for the foregoing reasons, it is hereby

**ORDERED** that Magistrate Judge Homer's March 20, 2009 order denying Byng's motion for appointment of counsel is **AFFIRMED**; it is further

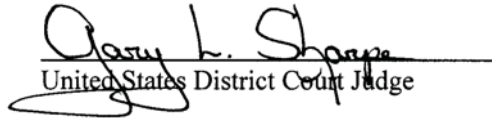
**ORDERED** that Magistrate Judge Homer's March 4, 2009 Report and Recommendation Order is adopted and Byng's motion to dismiss this action without prejudice under FRCP 41(a)(1) is denied; and it is further

**ORDERED** that Byng's motion to dismiss this action without prejudice under FRCP 41(a)(2) is denied; and it is further

**ORDERED** that the Clerk provide copies of this Memorandum-Decision and Order to the parties.

**IT IS SO ORDERED.**

Albany, New York  
September 28, 2009

  
United States District Court Judge